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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
NATIONAL TREASURY EMPLOYEES UNION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL TREASURY EMPLOYEES UNION

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT 2

NTEU DOES NOT OPPOSE THE PETITION 9

TABLE OF AUTHORITIES

Cases:

Department of Agriculture v. FLRA,
No. 81-1948 (Aug. 9, 1982), rehearing denied
(8th Cir. Sept. 14, 1982) 9

Division of Military and Naval Affairs v. FLRA,
683 F.2d 45, rehearing denied
(2nd Cir. Sept. 17, 1982) 9

Ford Motor Co. v. NLRB,
441 U.S. 488 (1979) 7

General Electric Co. v. Gilbert,
429 U.S. 125 (1976) 7

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 7

Statutes:

5 U.S.C. (Supp. V) 5701 *et seq.* **6**

5 U.S.C. (Supp. V) 5702 ..... **8**

5 U.S.C. (Supp. V) 7101 *et seq.* **2**

5 U.S.C. (Supp. V) 7101(a) **6, 8, 9**

5 U.S.C. (Supp. V) 7105(a)(1) 9

5 U.S.C. (Supp. V) 7106(b)(2) 2

5 U.S.C. (Supp. V) 7116(a)(1) 3, 4, 7

5 U.S.C. (Supp. V) 7116(a)(8) 3, 4, 7

5 U.S.C. (Supp. V) 7123(c) 7

5 U.S.C. (Supp. V) 7131(a) ..... *passim*

Miscellaneous:

124 *Cong. Rec.* 29188 (1978) 6

H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978) 5

S. 2640, Section 7232 5

S. Rep. No. 95-969, 95th Cong., 2d Sess. 112 (1978) 5

44 Comp. Gen. 617 (1965) 5

Interpretation and Guidance, 2 FLRA No. 31, 2 FLRA 265 (December 19, 1979) ..... *passim*

44 *Fed. Reg.* 42788 (July 20, 1979) 4

Executive Order No. 11491, as amended, reprinted in 5 U.S.C. (Supp. V) 7101 note at 312 ..... 5, 8

5 C.F.R. 2427.1 *et seq.* 4

Union Recognition In the Federal Government, **U.S. Office of Personnel Management (November, 1981)** 11

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INTRODUCTION

On November 10, 1982, the Bureau of Alcohol, Tobacco and Firearms ("ATF") petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The opinion of the Court of Appeals is reported at 672 F.2d 732, and is appended to the petition (App. D at 15a-34a).

It is the position of the respondent National Treasury Employees Union ("NTEU" or "union") that the Ninth Circuit decision is correct and should be affirmed.

However, because of the importance and the recurring nature of the issue presented in this case, NTEU does not oppose the ATF petition. A division among the Circuits now exists over this important question, causing uncertainty and confusion for all participants in federal government labor management relations. Resolution of this fundamental question by this Court will be of benefit to labor and management alike.

STATEMENT

1. This case arose when ATF decided to move its Lodi, California Area Office to Sacramento, and to establish a smaller Lodi post of duty at a different location in Lodi (Pet. App. 22a).[1] As a result of the relocation, nine employees were required to move to Sacramento (Jt. Ex. 1).[2] Pursuant to the Federal Service Labor Management Relations Statute, 5 U.S.C. (Supp. V) 7101 *et. seq.*, ATF exercised its management right to decide whether or not to move its office. ATF was not required to negotiate with the union over its decision to relocate offices. The Statute only obliged ATF to negotiate over the procedures it would follow in executing the relocation. 5 U.S.C. (Supp. V) 7106(b)(2), (*e.g.*, job assignment of moving employees, parking facilities, adjustment to new commuting schedules). It was in the negotiation between ATF and NTEU of the related procedures that the dispute surfaced.

ATF management was represented by four negotiators whereas NTEU had one employee representative (Pet.

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[1]Citations to the Appendix to the Petition shall be referred to as "Pet. App.____".

[2]Joint Exhibits shall be denoted "Jt. Ex.," and refer to exhibits introduced at the February 27, 1980 hearing before the Federal Labor Relations Authority ("FLRA" or "Authority") Administrative Law Judge.

App. 22a-24a). In connection with the negotiation, the parties traveled to Sacramento and Lodi to view the new facilities (Pet. App. 23a, 24a). All four ATF management officials received "official time" (*i.e.*, pay) and travel expenses to negotiate. ATF refused official time and travel expenses for the single union representative. ATF required the union representative to take annual leave (personal vacation time) to participate in the bargaining, and to pay his own travel expenses (Pet. App. 23a). To participate in the negotiation the single federal employee union representative drove his automobile approximately 303 miles from his home in Madera, California, to Sacramento, California, to Lodi, California, and then back home (Pet. App. 25a n. 7).

2. NTEU filed an unfair labor practice charge with the General Counsel of the Federal Labor Relations Authority. NTEU challenged the ATF practice of denying official time and travel expenses to the union negotiator, while granting both time and travel expenses to all four management representatives involved in the same collective bargaining. On January 29, 1980, the FLRA General Counsel issued a complaint and notice of hearing alleging that ATF committed unfair labor practices in violation of Sections 7116(a)(1) and (8) of the Statute. On February 27, 1980, a hearing was held before an FLRA Administrative Law Judge ("ALJ").

On May 12, 1980, the judge issued his recommended decision and order (Pet. App. D, 20a-34a). The ALJ concluded that ATF committed unfair labor practices contrary to Sections 7116(a)(1) and (8). He ruled that 5 U.S.C. Section 7131(a), which requires that employees receive "official time" for negotiating collective bargaining agreements, obligated ATF to grant the NTEU representative official time and travel expenses incident to the

negotiations. In so ruling, the ALJ based his decision upon the Authority's prior *Interpretation and Guidance,* 2 FLRA No. 31, 2 FLRA 265 (December 19, 1979) (Pet. App. E, 35a-47a).

On September 29, 1980, the Authority issued it final decision and order in this case (Pet. App. D, 15a-34a). The FLRA affirmed the ALJ decision that ATF violated Sections 7116(a)(1) and (8). The Authority relied upon its previously issued *Interpretation and Guidance, supra,* and adopted the ALJ's findings, conclusions and recommendations.

3. The FLRA issued the *Interpretation and Guidance, supra,* centrally involved in this appeal, in response to obvious uncertainty in the federal labor-management community over whether Section 7131(a) automatically granted time to union negotiators for mid-term negotiations, and whether union negotiators were entitled to travel expenses from their agencies. The Authority recognized the importance of these questions, and decided to address them through an interpretative rule, styled an "Interpretation and Guidance" in the FLRA regulations. *See* 5 C.F.R. Sections 2427.1-2427.5. The FLRA announced its intent in a *Federal Register* notice at 44 *Fed. Reg.* 42788 (July 20, 1979). After considering the comments of all interested persons the FLRA issued its final decision on December 19, 1979, addressing both issues[3] (Pet. App. E, 35a-47a).

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[3]Regarding mid-term bargaining, the FLRA decided that Section 7131(a) required official time for employee representatives. Therefore, 100% official time is available for mid-term "impact" bargaining, as well as for master contract ("term") negotiations. This ruling was affirmed by the Ninth Circuit below, and ATF does not contest that aspect of the decision in its Petition (Pet. at 9 n.7).

It was in this *Interpretation and Guidance* ruling that the FLRA articulated its rationale for requiring that Federal employees negotiating on behalf of unions be paid travel expenses in the same way as agency management negotiators. The FLRA first observed that the legislative history of Section 7131(a) indicated that Congress intended union negotiators to be authorized the equivalent of "paid time" when negotiating.[4] Union negotiators were entitled to their usual compensation, including all fringe benefits, as if they were in a duty status (Pet. App. 42a).

The FLRA also recognized that, like Executive Order No. 11491, as amended,[5] which preceeded it, the Statute lacks a specific provision answering the travel expense question. The Order had been construed not to authorize travel expenses for union negotiators.[6] However, the legislative history of the Statute shows that a Senate version of Section 7131(a) identical to the pertinent provision of the Order was rejected.[7] The rejected Senate language would have continued the strict Executive Order prohibitions against official time for union negotiators. The House language, which was enacted as Section 7131(a) of the Statute, directly reversed the Order's rule – instead of generally prohibiting time for employee representatives to negotiate, 100% official time was mandatory (Pet. App 42a n. 6).

The FLRA also relied upon the Statute's explicit endorsement of collective bargaining as in the public interest, and as promoting government efficiency. *See* 5

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[4]H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978).

[5]Exec. Order No. 11491, as amended, is reprinted in 5 U.S.C. (Supp. V) 7101 note at 312.

[6]44 Comp. Gen. 617 (1965).

[7]Section 7232 of S. 2640. *See also* S. Rep. No. 95-969, 95th Cong., 2d Sess. 112 (1978).

U.S.C. (Supp. V) 7101(a). This was in sharp contrast to the Order, which did not encourage collective bargaining, or recognize collective bargaining as in the public interest. Indeed, the term "collective bargaining" did not appear in the Order.

In addition, the FLRA explicitly recognized that under the Order management negotiators uniformly had their travel expenses paid, whereas union negotiators did not. One of the purposes of the Act was to "more nearly equate" labor and management in these important areas[8] (Pet. App. 43a, 44a).

Having decided that union negotiators are on "official time," the FLRA then applied the authorization contained in 5 U.S.C. (Supp. V) 5701 *et. seq.* that travel expenses be paid to employees "engaged in official business for the government." Under the new law, then, travel expenses are authorized for employee negotiators because such employees are on "paid time," participating in a process that improves government efficiency, is in the public interest, and is a major purpose of the Act – collective bargaining (Pet. App. 43a).[9]

4. ATF challenged the final FLRA decision in the subject case (4 FLRA No. 40) (Pet. App. D, 15a-34a) by an appeal to the U.S. Court of Appeals for the Ninth Circuit. ATF contested both issues addressed in the *Interpretation and Guidance, supra* (Pet. App. E, 35a): a) whether Section 7131(a) of the Statute provides official time for union negotiators participating in mid-term negotiations; and b) whether Section 7131(a) obligates Federal agencies to pay

[8]124 *Cong. Rec.* 29188 (1978).

[9]The FLRA also observed that the new law placed enlarged responsibilities on exclusive representatives. Provision of travel expenses to union negotiators would ease this new burden and further the overriding purposes of the law.

the travel expenses for employees negotiating on behalf of unions.

A unanimous panel of the Ninth Circuit dismissed the ATF petition on both issues, and enforced the FLRA order holding that ATF committed unfair labor practices in violation of Section 7116(a)(1) and (8) of the Statute (Pet. App. A, 1a-11a). The panel also unanimously denied ATF's petition for rehearing, and rejected the suggestion of a rehearing en banc with no judge of the full court requesting a vote on the suggestion for rehearing en banc (Pet. App. C, 14a).

In unanimously affirming the FLRA, the Ninth Circuit applied the proper standard of review (Pet. App. A, 4a, 5a). Under 5 U.S.C. (Supp. V) 7123(c) the FLRA decision may be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. The Court below correctly recognized that the FLRA *Interpretation and Guidance, supra,* upon which 4 FLRA No. 40 is squarely based, was an interpretative rule. As such it is entitled less weight on review than rules formally promulgated pursuant to Congressionally delegated rulemaking authority. *General Electric Co. v. Gilbert,* 429 U.S. 125, 141 (1976). Consequently the Ninth Circuit scrutinized the Interpretation and Guidance and accorded it only the deference deserved by virtue of its decision and rationale. *See Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). Expressly recognizing that an agency cannot "usurp Congressional authority" to make policy (*Ford Motor Co., v. NLRB,* 441 U.S. 488, 497 (1979)), the Court upheld the FLRA decision as a "reasoned and supportable" interpretation of the law the FLRA is charged to enforce (Pet. App. A, 5a).

ATF argues that the FLRA *Interpretation and Guidance* should not receive the normal deference accorded to administrative agencies construing their enabling act,

because the FLRA relied upon 5 U.S.C. (Supp. V) 5702 in its decision (Pet. at 18). Section 5702, not a part of the Civil Service Reform Act, is the statutory provision which authorizes the federal government to pay for travel expenses incident to official government business. However, the Ninth Circuit correctly recognized that the FLRA's conclusion that federal employees negotiating for unions are entitled to travel expenses is based upon the intent of Congress when enacting the Statute, not 5 U.S.C. (Supp. V) 5702. Although the FLRA did cite Section 5702 in its *Interpretation and Guidance,* the legal basis for paying travel expenses to union negotiators is derived from the new Statute where Congress concluded that participation in collective bargaining promotes efficient government, and is the equivalent of official government business. *See* 5 U.S.C. (Supp. V) 7101(a) and 7131(a). Once this legislative intent is established, 5 U.S.C. (Supp. V) 5702 authorizes payment of travel expenses to negotiators in the same ministerial fashion as for travel incident to any other official government business (Pet. App. A, 10a).

In addition, the Court below also properly concurred in the FLRA reading of Congressional intent that past inequities between labor and management in federal government labor relations be rectified. Under Executive Order No. 11491, as amended, management negotiators routinely received 100% "official time" (full salary) to negotiate, plus complete reimbursement for necessary travel expenses incident to negotiations. *Interpretation and Guidance, supra* at 269 (Pet. App. E, 43a; Pet. App. A, 10a). In contrast, union negotiators received only one-half their salary for time spent negotiating, and received no travel expense reimbursement from their employing federal agency.[10] In affirming the FLRA, the Ninth Circuit correctly observed

[10] *See* Exec. Order No. 11491, as amended, Section 20.

that the new Statute had as one of its purposes to foster collective bargaining, subject to strict management rights, and to more nearly equalize the positions of labor and management in the bargaining process[11] (Pet. App. A, 10a, 11a). By explicitly finding that collective bargaining in the federal government is in the public interest and promotes efficient government,[12] negotiators for agency management and labor alike perform official government business when participating in collective bargaining. 5 U.S.C. (Supp. V) 7101(a) and 7131(a). Therefore, any travel by labor or management negotiators, incident to collective bargaining, must be reimbursed.

The Ninth Circuit's opinion affirming the Authority is correctly decided and should be affirmed. The Ninth Circuit properly deferred to the FLRA's expertise in handling an issue of this complexity and magnitude, since it arises directly within the ambit of FLRA knowledge and responsibility in administering the new law. 5 U.S.C. (Supp. V) 7105(a)(1).

NTEU DOES NOT OPPOSE THE PETITION

NTEU shares many of the practical problems ATF voices in its petition, resulting from the split among the Circuits on this issue,[13] Owing to the importance of this

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[11]The need for equalization is especially clear in the case at bar where ATF was represented by four management negotiators, whereas the union was represented by a single federal employee (Pet. App. D, 23a, 24a).

[12]*See* 5 U.S.C. (Supp. V) 7101(a).

[13]Unlike the Ninth Circuit, the Second and Eighth Circuits have issued decisions reversing the FLRA travel expense ruling. *See Division of Military & Naval Affairs v. FLRA*, 683 F.2d 45 (1982), rehearing denied (2nd Cir. Sept. 17, 1982); *Dept. of Agriculture v. FLRA*, No. 81-1948 (Aug. 9, 1982), rehearing denied (8th Cir. Sept. 14, 1982). Both decisions were 2-1, with separate dissenting opinions.

issue for collective bargaining in federal labor management relations, and because of the problems caused by the split among the Circuits, NTEU does not oppose the ATF petition.

The division among the three Circuits that have decided this issue is causing confusion and uncertainty throughout the federal government. The question whether travel expenses shall be paid for union negotiators arises repeatedly throughout the nation, whenever a union representative travels to participate in collective bargaining. Considerable uncertainty now exists over what the law is, especially in those judicial Circuits where this issue has not yet been decided. Even when the issue has been decided, the geographical reach of the decision remains uncertain as long as the split of authority exists. Travel to negotiations outside the geographical limits of the Ninth Circuit, for example, might raise a question whether the Ninth Circuit rule governs.

The issue presented in the ATF petition is a recurring one. Unless this Court resolves the issue, it will unquestionably be litigated to decision in all judicial Circuits, an unnecessary expenditure of judicial resources. Continued litigation in every Circuit is also likely to compound the current uncertainty and confusion over what the law is, contrary to the interests of all concerned parties throughout the government.

Finally, the issue is an important one. At present, employees of the same agency are treated differently depending on where they happen to live and work. Moreover, in addition to the substantial monies at stake (Pet. at 13 n.12), which the union does not dispute, final resolution of the issue will have a major long-term impact on the character of the collective bargaining process in the federal government. As of November 1, 1981, 1,234,256

federal employees were included in units of exclusive recognition.[14] The decision of this Court will have a direct impact on the ability of the labor unions representing these employees to effectively discharge their collective bargaining duties under the Statute.

Respectfully submitted,

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[14] *Union Recognition In The Federal Government,* U.S. Office of Personnel Management (November, 1981).